

This letter SUPERSEDES the *Gordon* Advice Letter, No. A-09-240 to the extent it is inconsistent with the analysis in this letter.

November 25, 2014

Eric S. Vail
Burke Williams & Sorensen, LLP
1600 Iowa Avenue, Suite 250
Riverside, CA 92507-7426

Re: Your Request for Advice
Our File No. A-14-192

Dear Mr. Vail:

This letter responds to your request for advice on behalf of Thomas Chavez, City Council Member for the City of Temple City, regarding his duties under the conflict of interest provisions of the Political Reform Act (the “Act”).¹ Because the Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), this advice is based solely on the facts presented.

Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090.

QUESTION

May Councilmember Chavez participate in the current city deliberations and actions concerning negotiations with the Temple City Employees Association (TCEA) and vote on the approval of a Memorandum of Understanding (MOU) with TCEA despite having received income from city employees that are represented by TCEA within the past 12 months?

CONCLUSION

Councilmember Chavez may participate in city deliberations and negotiations with the employee unions despite receiving income from some city employees represented by the unions,

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

and may continue receiving income from employees, so long as the deliberations and negotiations will not affect the income, investments, or other tangible or intangible assets or liabilities of the sources of income by \$1,000 or more within 12 months after the decision.

FACTS

Temple City Councilmember Chavez is, in his private capacity, a practicing attorney. During his current term as Councilmember, he has performed legal services, including the preparation and amendment of estate plans and the administration of estates, for individuals employed by the City. The most recent of these legal services was performed for one City employee, who paid \$500 for estate planning services in May 2014.

On March 13, 2014, the City received a petition from certain employees to unionize and be represented by the TCEA. The City formally recognized the TCEA and on April 4, 2014, began the negotiation process required under the Meyers-Milias-Brown Act (Section 3500 et seq.), which continues. These negotiations will ultimately result in a MOU with TCEA governing the terms and conditions of employment for represented employees, including compensation and benefits. As of the date the request for advice was prepared and submitted, compensation of represented employees has not yet been resolved.

TCEA now represents City employees who have paid Councilmember Chavez for legal services in the twelve months prior to the City commencing negotiations with TCEA. The employee who received legal services in May 2014 serves on the Board of TCEA and is involved in labor negotiation sessions with the City's bargaining team.

Members of the City Council do not take an active part in labor negotiation sessions and are not present at those sessions. However, the City Council does consider proposals from and offers to TCEA presented by the City's bargaining team, and they provide direction to the City's bargaining team on such proposals, offers, and negotiation strategy, as well as setting the overall objectives for the City in those negotiations. Since the commencement of labor negotiations with TCEA, Councilmember Chavez has refrained from any participation and recused himself from all relevant open and closed sessions related to negotiations.

ANALYSIS

Section 87100 of the Act prohibits public officials at any level of state or local government from making, participating in making, or in any way attempting to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest. (Section 87100; Regulation 18700.) An official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on the official or the official's interests, including sources of income. (Section 87103; Regulation 18700(a).) To determine if an individual has a disqualifying financial interest under the Act, the Commission applies the following eight step analysis.

Steps One and Two: Is the Councilmember a “public official” who will be making, participating in making, or influencing a governmental decision?

As a member of the Temple City City Council, Councilmember Chavez is a “public official” for purposes of the Act. You expressly ask whether he may make, participate in making, or influence governmental decisions concerning the TCEA MOU.

Step Three: Does the Councilmember have an interest in the decision?

The Act’s conflict of interest provisions identify five general categories of interests that may result in disqualification: investments and positions in business entities, interests in real property, sources of income, sources of gifts, and personal finances. (Section 87103.)

Relevant here, Councilmember Chavez has an interest in clients that have paid him \$500 or more in the past 12 months. Your specific question concerns a city employee that has paid the councilmember more than \$500 in the past 12 months. The employee would be considered a source of income under the Act. (Section 87103(c).)

You also asked whether TCEA would be considered a source of income to the councilmember if he receives income totaling \$500 or more in a 12 month period from individuals who are TCEA members. While we have advised that that income paid by a nonprofit entity, in some cases, may be imputed to a controlling member (See e.g., *Chamberlain* Advice Letter, No. A-09-045), in this case TCEA is not a source of income, but individual members may be. Nothing in your facts suggests that any of the employee income to the councilmember should be imputed to TCEA. Therefore, the Councilmember does not have an interest in TCEA.

Step Four: Is the economic interest directly or indirectly involved in the governmental decision?

To determine whether a governmental decision’s reasonably foreseeable financial effect on an economic interest is material or not, you first must determine whether the interest is directly or indirectly involved. (Regulation 18704(a).)

Sources of income are directly involved in a governmental decision before the official’s agency when the source, either directly or through an agent, initiates the proceeding in which the decision will be made or is a named party, or is the subject of, the proceeding. (Regulation 18704.1.) A source of income is the subject of the proceeding if the decision involves the “renewal, approval (or) denial,” of any “entitlement to or contract with” the source of income. (Regulation 18704.1(a)(2).) The source of income will be deemed indirectly involved in the governmental decision if it is not directly involved. (Regulation 18704(a).)

In the past, we have advised that because union contracts generally affect an entire class of city employees, the individual city employees who may be economic interests of a member of the city council are not directly involved in the contract process. For example, in the *DeBerry* Advice Letter, No. I-00-188, we advised that city employees who rented from a city Councilmember were “sources of income” of that Councilmember, but would only be indirectly involved in the “contract process” between the city council and the employees’ union. Similarly for Councilmember Chavez, assuming that the MOU would affect an entire class of city employees, the employee who is a source of income would be indirectly involved in the council’s deliberations, actions, or negotiations.

You noted that the *Gordon* Advice Letter, No. A-09-240, reached a different conclusion. In *Gordon* we advised: “[E]mployees, including those who are your patients, are subjects of these proceedings because decisions to approve an MOU, compensation package or employment agreement involve approval or denial of ‘entitlements to’ or ‘contracts with’ the employees covered by the MOU, compensation package, or employment agreement. For example, an MOU is a contract between the city and the covered employees. In addition, a decision to approve an MOU necessarily involves approval of all the terms of the MOU, including terms that provide vision care insurance, an entitlement to the employees. Accordingly, patients who are city employees are directly involved in these decisions.”

However, the *Gordon* letter is not consistent with our current analysis. While prior advice is not precedential, the analysis does provide guidance to officials. Therefore, we supersede the *Gordon* letter to the extent it is inconsistent with the analysis in this letter.

Steps Five and Six: Will the governmental decision have a reasonably foreseeable² material financial effect on the public official’s economic interest?

Because Councilmember Chavez’s sources of income are indirectly involved in the decisions, Regulation 18705.3(b)(3) applies. Regulation 18705.3(b)(3) states that the effect of a decision is material if the decision will affect the income, investments, or other tangible or intangible assets or liabilities of the sources of income by \$1,000 or more in a 12 month period.³ In other words, if an amendment to the MOU results in a \$1,000 change to the employee’s income or other assets during the 12 months following the decision, the financial effect will be material and you will have a prohibited conflict of interest.⁴

² A financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official’s control, it is not reasonably foreseeable.

³ While Regulation 18705.3(b)(3)(A) does not explicitly set a 12 month window for the financial effect to occur, the time limitation is implicit in that without such a time limit any incremental financial effect would be disqualifying, effectively making the \$1,000 threshold meaningless.

⁴ If you will have a conflict of interest in a decision noticed at a public meeting, then you must: (1) immediately prior to the discussion of the item, verbally identify each type of economic interest involved in the

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: John W. Wallace
Assistant General Counsel
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decision as well as details of the economic interest, as discussed in Regulation 18702.5(b)(1)(B), on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences and speaking as a member of the public regarding personal interests, special rules found in Regulation 18702.5, subdivisions (c) and (d) apply. (Section 87105.)